United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1016

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,

APPELLEE,

v.

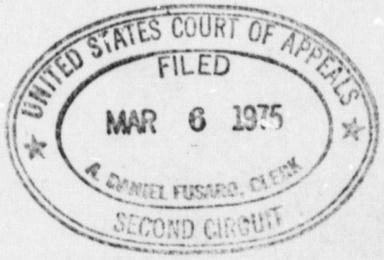
CAROL PRYCE, a/k/a JUNIOR PRYCE,

DEFENDANT-APPELLANT

APPELLANT'S BRIEF ON APPEAL

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF NEW YORK

Docket No. 75-1016
Cr. No. 74-16



CHARLES F. CRIMI
Attorney for Appellant
Office & P.O. Address
700 Wilder Building
Rochester, New York 14614
(716) 325-2110

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STATEMENT OF CASE

On January 22, 1974, the appellant was indicted by a Grand Jury for the Western District of New York. The indictment was framed in three counts. Counts 1 and 2 charged him with an attempt to bring into the United States aliens in violations of Title 8, United States Code, Section 1324 (a)(1); and Count Three, conspiracy to commit the offense of attempting to bring an alien into the United States in violation of Title 18, United States Code, Section 371. On January 31, 1974, the appellant was arraigned and Charles F. Crimi, Esq. was assigned as counsel.

The trial was had before Honorable John T. Curtin, United States District Court Judge for the Western District of New York and a jury on October 25, 30, 31; November 6 and 7, 1974. The jury found the appellant guilty of Count 1, attempting to bring in an alien named Keith Grizzle and Count 3, conspiring to commit an offense by attempting to bring into the United States the said alien Keith Grizzle. The jury acquitted him of attempting to bring into the United States another alien, Leroy Cephas, which was the charge contained in Count 2 of the indictment. On January 6, 1974 the appellant was sentenced

for a period of one year on each count (Counts 1 and 3) to run concurrently.

The notice of appeal was filed on January 6, 1974. Thereafter, Charles F. Crimi, Esq. was continued as assigned counsel by this Court to perfect the appeal.

STATEMENT OF FACTS

Jamaican Background

Monica Pryce was a citizen of Jamaica. [R. 128, 17a]. While there she bore two children of one Barrington Pryce, the appellant's brother. Thereafter, and apparently for five years she lived in Jamaica with one Keith Grizzle, and bore him one child. [R. 162, 163; 33a, 34a]. In 1970, while on vacation in Jamaica, appellant's brother, was asked by Monica to find someone to "sponsor" her to America. [R. 156, 26a]. In April of 1971, Barrington Pryce wrote her that if she wanted to come to America, she could marry his brother, the appellant, when he came to Jamaica on vacation. [R. 156, 26a]. The appellant did go to Jamaica on vacation in May, 1971. [R. 157, 27a]. The appellant also had two children in Jamaica. [R. 158, 159; 28a 29a].

The Marriage

While on his Jamaican holiday, the appellant married Monica, on May 20, 1971. [R. 159, 29a]. The marriage was solemnized before a Justice of the Peace in Kingston, Jamaica. [R. 159, 29a].

Monica comes to America

On June 30, 1973, Monica came to Rochester, New York as the appellant's wife. [R. 160, 161a, 30a, 31a]. Approximately three months after Monica came to the United States, Keith Grizzle arrived in Toronto, Canada from Jamaica on September 14, 1973, as a visitor [R. 106, 11a], and he was met at the airport there by Monica. [R. 66, 10a]. Monica visited with him there for two days. [R. 66, 10a]. Grizzle wanted to enter the United States [R. 123-126, 14a-16a] and it was part of a plan he and Monica had been developing for the years they lived together in Jamaica. [R. 123, 14a].

Events in Rochester, New York

Upon her return to Rochester, New York from Toronto, Monica solicited the appellant, her legal husband for help to get Grizzle into the United States. [R. 191, 53a]. The

appellant did not know of any person to help Grizzle but said he would find out. [R. 191-192; 53a, 54a]. Thereafter, appellant told her he had found someone [R. 192, 54a]; he later received from her Grizzle's height, age, address and phone number in Canada. [R. 192; 54a].

Events in Toronto

Grizzle, on October 1, 1973, met the appellant and one Leroy Cephas, at his sister's home in Toronto. [R. 65]. Grizzle, while there, was given identification papers by the appellant of one Manny McCutcheon. [R. 75]. Grizzle testified that the appellant schooled him as to what responses he should make to inquiries at the border by officials. [R. 71-78]. Thereafter appellant was dropped at a Toronto subway [R. 79, 82]; and Grizzle, Cephas and a girl called "Princess" drove to the border. [R. 84]. The appellant flew to Rochester, New York via Allegany Airlines, and there was evidence in the case of a flight coupon having been issued in his name and an expert testified that his thumbprint was on the flight coupon. [R. 420].

The Border Stop

At the border, after some preliminary questioning, Grizzle and Cephas were charged with crimes. [R. 91].

Hearing on Admissibility of Monica Pryce's Testimony

At the trial, counsel for appellant objected to Monica's testimony as it applied to the appellant on the grounds that such was privileged. The Court held a hearing outside of the jury's presence. At the time the objection was made it was Governments' understanding that Monica had lived with Carol Pryce, the appellant at 10 Dudley Street, Rochester, New York for a month. [R. 141]. During the hearing and at trial, Monica denied this. [R. 164, 35a; R. 223, 73a, R. 227, 77a].

At the hearing Monica testified that she had married appellant on May 20, 1971, that marriage license fee was paid by Grizzle; that Carol Pryce left her right after the ceremony; that she never lived with the appellant anywhere nor shared his bed. [R. 158-165; 28a-36a]. After the hearing, the Trial Judge, Honorable John T. Curtin, held that Monica's testimony was not inadmissible. [R. 185-187, 47a-49a].

ISSUE PRESENTED

DID THE LOWER COURT ERR IN RULING THAT THE MARITAL PRIVILEGE WAS NOT APPLICABLE WHERE THE MARRIAGE BETWEEN THE PARTIES WAS CONCEDEDLY VALID BUT THE FACTS INDICATED THAT THE PARTIES DID NOT INTEND TO NOR EVER DID LIVE TOGETHER AND THE MARRIAGE WAS NEVER CONSUMATED?

POINT ONE

THE LOWER COURT ERRED IN DECLARING THAT THE SPOUSAL PRIVILEGE WAS INAPPLICABLE.

During the trial, the United States called as one of its witnesses, one Monica Pryce. Upon testifying that she was the wife of the appellant, counsel for the appellant objected to any further testimony on her part concerning communications with her husband, the appellant. At that time the Court ordered that a hearing be held outside of the presence of the jury. At that time the United States represented that, among other things, the testimony of Monica Pryce would be that after her marriage she lived for about a month with the appellant at 10 Dudley Street in the City of Rochester, New York. However, at the hearing she testified that she never lived with the defendant and at the trial she repudiated her statement to the Immigration

officials that she had lived with the appellant at 10 Dusley Street. [R. 164, 35a; R. 223-225, 73a-75a].

The hearing disclosed that Monica Pryce married the appellant on May 20, 1971. This marriage grew out of her conversations with the appellant's brother about a year before. At that time she asked appellant's brother to help her find someone to get her into the United States, presumably since she wanted "to get some good in life." R. 157, 27a]. The appellant's brother wrote her a year later, approximately April 1971, telling her that the appellant was coming to Jamaica and if she wanted to come to America, she could marry him. [R. 156, 26a]. In May of 1971 appellant came to Jamaica, and Monica and he were married by a Justice of the Peace in Kingston, Jamaica. According to Monica, the appellant entered into the marriage so that she, as his wife, could bring his two children as a stepmother into the United States. [R. 157, 27a]. Monica Pryce also testified that she at no time cohabited with the appellant and at no time was the marriage consummated. The trial court found that the marriage was valid and in accordance with the laws of Jamaica. [R. 175, 46a, R. 185, 47a]. However, he found

that the evidence disclosed that the parties never intended to live together and accordingly the privilege did not obtain because the privilege was founded on a desire to protect a marital relationship and to avoid disunity and destruction of a marriage. [R. 185, 47a, R. 186, 48a]. There was no finding nor was the question reached, as to whether the communications were waived by the appellant by disclosing to third parties the communications; or whether the communications were confidential communications.

Appellant urges his counsel to argue that notwithstanding the facts as educed at the hearing, the lower court in effect nullified or declared as void a valid marriage as far as the application of an evidentiary principle was concerned, and thereby committed error.

In Lutwak v. United States, 344 U.S. 604 (1953) the Supreme Court had occasion to rule on the question as to whether "ostensible wives" could testify against their husbands in a case dealing in the commission of offenses against the United States by illegally obtaining entry of aliens as spouses of veterans. In that case, the Supreme Court held that the spousal privilege did not apply.

But Lutwak differs from the instant case. In Lutwak while the validity of the marriages was held to be immaterial, the defendants were charged with concealing material facts about their marital status and an issue was presented to the jury for them to determine whether or not the testimony heard concerning the marriages made the defendants representations as to their marital status a concealment of material facts. Here the appellant was charged with attempting to bring into the United States two aliens and conspiring to do so. The marital status of the appellant played no part in the charges. The only question was whether the wife could testify to any communications made to her by him during the marriage - a broader issue, indeed.

In United States v. Diogo, 320 F_2D 898 2 Cir. (1963) where the issue was whether or not the parties who had married in order to permit the alien party to the marriage to remain in the United States, had falsely stated their marital status knowing of the falsity at the time of such utterance, this Court held the Government's proof was insufficient as a matter of law.

The Court, after reviewing the New York and New Jersey Law, came to the conclusion that since the marriages as such

were not void when contracted, that the defendants in the case could not have falsely stated their marital status so as to commit the crimes charged. Again, Diogo is not in point, except that it seems to instruct that the Lutwak case is not to be read to set up a federal standard of validity for marriages and that the intentions of the parties should be reviewed. It is our belief that with the Diogo case in mind, the lower court ordered the hearing, to determine the intention of the parties.

There is no need to cite authorities that at the common law a husband or wife were disqualified to testify as witnesses. Under New York Law, CPLR §4502 (b) neither spouse maybe required to testify without consent of the other to disclose a confidential communication made by one to the other during marriage. There are exceptions to the privilege such as where child abuse is involved; or the spouse testifying is the victim of the husband. See Prince, Richardson on Evidence, p. 439-440 §446 19th Edition, 1973. Other states generally follow the same pattern. See Cleary, McCormicks' Handbook on Evidence, p. 170-171, pp 84, 2nd Edition, 1972. None of these exceptions can be applied here.

In conclusion, appellant urges counsel to argue that where the validity of the marriage is unquestioned, and the marriage has so existed for over two years, and there is no finding other than the parties to the marriage did not live together or have sex relations, that the Government has not proven that the marital privilege is inapplicable and the Court erred in so ruling.

The ruling of the Court, of course, permitted Monica Pryce to testify to all her conversations had with her husband during the life of the conspiracy as alleged in Count III of the indictment. It must be remembered that Monica was an unindicted co-conspirator and alleged as so in the indictment (5a); also her communications are set forth in the overt acts, 2 and 3 in that same count. (6a). It is obvious then if her conversations with the appellant were erroneously received that the conspiracy as alleged in Count III would not have been proven; and the proof under Count One of the indictment would have been unaided by the relaxed evidentiary principles concerning conspirators and co-conspirators. Accordingly, if the Court erred, the convictions should be reversed and a new trial ordered.

POINT TWO

THE CONVICTIONS SHOULD BE REVERSED AND A NEW TRIAL ORDERED

Respectfully submitted,

CHARLES F. CRIMI
Attorney for Appellant
Office & P.O. Address
Suite 700-One East Main Street
Rochester, New York 14614
Tel. (716) 325-2110

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK)
COUNTY OF MONROE) SS:
CITY OF ROCHESTER)

JUDITH C. PEACOCK, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at Rochester, New York.

On March 4, 1975 deponent served the within Brief and Appendix upon Kenneth Cohen, Assistant United States Attorney, attorney for the United States in this action, at the United States Attorney's Office, United States Courthouse, Buffalo, New York, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

Judith C. Peacock
JUDITH C. PEACOCK

Sworn to before me this 4 day of March, 1975.

Judith A. Hopkins
Commissioner of Deeds
JUDITH A. HOPKINS
COMMISSIONER OF DEEDS
CITY OF ROCHESTER, N. Y.
Commission Expires Sept 5 19.76